83 - 1989
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

KEVIN WAYNE SULLIVAN,
Petitioner,

v.

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EDWARD E. BOSHEARS
1708 Ellis Street
Post Office Box 1395
Brunswick, Georgia 31521
(912) 264-6662

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3088

QUESTIONS PRESENTED

(1) Whether the Court of Appeals was bound by the decision of the Supreme Court in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959) that states are subject to the Jones Act.

(2) Whether the District Court and the Court of Appeals were correct in interpreting Employees of the Department of Public Health & Welfare v. Dept. of Public Health & Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973) and Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973) to mean that a state is subject to suit for damages by a private citizen in Federal Court only when the statute in question explicitly and specifically provides that the states are subject to it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ——

KEVIN WAYNE SULLIVAN,
Petitioner,

v.

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner Kevin Wayne Sullivan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Eleventh Circuit entered in this proceeding on the 13th day of February, 1984.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. The opinion of the District Court also appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals For The Eleventh Circuit was entered on the 13th day of February, 1984. A timely petition for rehearing en banc was denied

on the 13th day of March, 1984, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Jones Act (46 U.S.C. § 688).

STATEMENT OF THE CASE

Petitioner was employed as a second mate or deckhand on a vessel known as the "Anna", which is owned and operated by the Georgia Department of Natural Resources.

The "Anna" is an oil screw approximately 54.2 feet in length. It is licensed with the Coast Guard for carrying on the "coasting trade". The "Anna" is used primarily in "fish and shrimp assessment programs". It is regularly operated in the coastal waters of Georgia, Florida and South Carolina.

On February 25, 1982, Petitioner was severely injured when a boom came loose and struck him in the head.

On May 4, 1982 Petitioner filed suit against the Georgia Department of Natural Resources under the Jones Act. On October 29, 1982, the District Court granted the Department's Motion to Dismiss.

Petitioner then appealed to the Eleventh Circuit Court of Appeals which subsequently affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A PRIOR DECISION OF THE SUPREME COURT.

The Court of Appeals decision states in part:

> "Assuming that the State of Georgia entered a federally regulated sphere of activity by operating a research vessel and that a private cause of action is

created for violating the Jones Act, neither the statute nor its legislative history constitutes an express congressional provision that the private remedy is applicable to the states. More precisely, Sullivan has failed to demonstrate Congress' express intention to abrogate immunity from suit in federal court."

The Court of Appeals further states in a footnote:

"Here there is arguably a private remedy against the states, See *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 281, 79 S.Ct. 785, 789-790, 3 L.Ed.2d 804 (1959); the issue should be whether Congress explicitly authorized suit in federal court notwithstanding immunity under the Eleventh Amendment."

The Jones Act, 46 U.S.C. § 688, states in part:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injuries to railway employees shall apply; . . . . Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act provides that "every common carrier by railroad which engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," and that "under this chapter an action may be brought in a district court of the United States . . . ." 45 U.S.C. §§ 51, 56.

In holding that the FELA authorizes suits in federal courts by injured railroad workers against states, the Supreme Court in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 12 L. Ed.2d 233, 84 S.Ct. 1207 stated:

> "We think that Congress, in making the FELA applicable to 'every' common carrier by railroad in interstate commerce, meant what it said."

In *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L.Ed.2d 804, 79 S.Ct. 785 (1959) the Supreme Court stated:

> "Finally we find no more reason for excepting state or bi-state corporations from 'employer as used in the Jones Act than we could for excepting them either from the Safety Appliance Act (United States v. California, 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421) or the Railway Labor Act (California v. Taylor, 353 U.S. 553, 1 L.Ed.2d 1034, 77 S.Ct. 1037). In the latter case we reviewed at length federal legislation governing employer-employee relationships and said, 'When Congress wished to exclude state employees, it expressly so provided.' 353 U.S., at 564. The Jones Act (46 U.S.C. § 688) has no exceptions from the broad sweep of the words 'Any seaman who shall suffer personal injury in the course of his employment may' etc. The rationale of United States v. California (US) supra, and California v. Taylor (US) supra, makes it impossible for us to mark a distinction here and hold that this bi-state agency is not an employer under the Jones Act."

Although the *Petty* decision also rested on the language of the compact creating the bi-state corporation, it is clear that the Supreme Court also clearly applied the same reasoning which it had previously applied in *United States v. California*, 297 U.S. 175, 80 L.Ed. 567, 56 S.Ct. 421 (Safety Appliance Act, 45 U.S.C. §§ 2, 6) and *California v. Taylor*, 353 U.S. 553, 1 L.Ed.2d 1034, 77 S.Ct. 1037 (Railway Labor Act, 45 U.S.C. § 151) and which it later applied in *Parden v. Terminal R. of Alabama Docks Dept.*, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207 (Federal Employers Liability Act, 45 U.S.C. § 51).

The Court of Appeals apparently felt that the *Petty* decision was overruled by implication by the Supreme

Court decision in *Employees of the Department of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973).

Although the language is not clear, the Court of Appeals seems to be saying that *Petty* merely authorizes suits against the states under the Jones Act but does not authorize them to be brought in Federal Court.

By arriving at that constrained interpretation, the Court of Appeals necessarily overruled *Petty* because the Jones Act itself explicitly states that the District Courts have jurisdiction of such Jones Act complaints.

The Court of Appeals clearly erred in failing to apply a prior controlling decision of the Supreme Court.

II. THE DECISION BELOW ERRED IN HOLDING THAT A FEDERAL STATUTE SUCH AS THE JONES ACT MUST EXPLICITLY PROVIDE THAT STATES ARE SUBJECT TO IT BEFORE AN ACTION AGAINST THE STATE CAN BE BROUGHT IN FEDERAL COURT.

When Congress used the words "any seaman" and "employer" in the Jones Act, it meant to cover *all* seamen and *all* employers that employ seamen.

When the State of Georgia chose to operate a vessel in navigable waters, and to employ seamen to operate those vessels, it necessarily subjected itself to the Jones Act.

The decision below seems to say that the Petitioner has not shown that Congress expressly authorized suit against the states under the Jones Act.

The Court of Appeals decision thus ignores the express words of the Jones Act, 46 U.S.C. § 688:

> "Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located."

The Court of Appeals would have us believe that this language is not enough. The Court holds in its decision that the above language must explicitly mention that the *states* are liable to suit in Federal Court. In so holding, the Court of Appeals relied upon *Employees of the Department of Public Health & Welfare v. Dept. of Public Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973).

In *Employees*, the Supreme Court was confronted with § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) which states:

> "Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in any additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction . . . ."

Sections 16 and 17 authorize the Secretary of Labor to bring suit for unpaid minimum wages or unpaid overtime and to enjoin violations and to seek restitution under the Act on behalf of employees.

Unlike the Jones Act, the FLSA does not contain any explicit statement that *an employee* can maintain an action against an employer in Federal Court.

The FLSA provides that "any employer" who violates the Act "shall be liable to the employee" and "an action to recover such liability may be maintained in any court of competent jurisdiction."

However, the FLSA does *not*:

(1) explicitly authorize any employee to bring a private action;

(2) explicitly make an "employer" liable for damages in Federal Court.

Insofar as a private employer is concerned, violation of the statute would give rise to an "implied" cause of action in favor of the class for whose benefit the statute was enacted. See *J.I. Case Company v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

However, there cannot be any such "implied" cause of action where a state is the Defendant.

An equally important point is that the Eleventh Amendment does *not* bar a suit by the United States against a state. *Monaco v. Mississippi*, 292 U.S. 313, 78 L.Ed. 1282, 54 S.Ct. 745 (1934).

Therefore, the Supreme Court in *Employees* simply held that, even though the states were subject to the FLSA and even though the state as an "employer" could be held "liable" to the employee, in the absence of an express right of action created in the Employee to bring suit in Federal Court, the employee was left with the remedy of having the Secretary of Labor bring an action on the employee's behalf to collect the damages from the state.

In order for an action to be brought against a state in Federal Court, it is not enough that the state is "liable" to the aggrieved person under a federal statute. In order for the state to be subject to suit in Federal Court, the statute must also explicitly set out that the aggrieved person has a private right of action in Federal Court against a particular class of persons (usually the employer). If the state fits within that class, then it is subject to suit for money damages in Federal Court even though the statute does not specifically mention the states.

Applying these decisions, we can see that the following criteria must apply in order for a state to be subject to a suit for money in Federal Court by a private citizen.

First, the state must have entered into "a federally regulated sphere of activity". Obviously, this would include operation of railroads or vessels in navigable water.

Second, Congress must have enacted a statute which imposed "liability" upon a particular class.

Third, the statute must not have delegated exclusive enforcement power in the Federal Government.

Fourth, the statute must have specifically given to a private individual the right to bring an action in court against the particular "class" of Defendants.

Fifth, the statute must provide that this action can be brought in Federal Court.

In *Hutto v. Finney*, 437 U.S. 678, 57 L.Ed.2d 522, 98 S.Ct. 2565, the Supreme Court seems to have rejected the legal theory espoused by the Court of Appeals in this case. This is the theory that the Congress must enact "express statutory language making the states liable". The Supreme Court stated:

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for states defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state actions."

In *Edelman v. Jordan*, 415 U.S. 651, 39 L.E.2d 662, 94 S.Ct. 1347 (1974), the Supreme Court noted that the question of waiver or consent under the Eleventh Amendment in numerous cases has turned on "whether the state by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity".

The State of Georgia, by operating a vessel in navigable water and employing seamen, subjected itself to suit for damages under the Jones Act.

It is true that no other Court of Appeals had held that states are subject to the Jones Act. (A number of District Courts have so held.) Therefore, there is no conflict between the circuits on this issue.

However, the issue is much broader than the Jones Act. The decision of the Court of Appeals will also apply to numerous other federal statutes such as the Federal Employers Liability Act, 45 U.S.C. § 51, Safety Appliance Act, 45 U.S.C. §§ 2, 6, and the Railway Labor Act, 45 U.S.C. § 151.

In this regard, two of the states within the Eleventh Circuit operate large state-owned railroad facilities. If this decision is allowed to stand, then railroad workers in those state facilities will be deprived of the protection of various federal statutes designed to regulate railroad operations. As a result, uniform federal regulations of railroads and railroad workers will be left with an enormous gap in the Eleventh Circuit.

For these reasons, it is imperative that the Supreme Court resolve the broad issue raised by the decision of the Court of Appeals.

CONCLUSION

The decisions of the lower Courts are in error on an important point of constitutional law and therefore the decision of the lower Courts should be reversed.

EDWARD E. BOSHEARS
1708 Ellis Street
Post Office Box 1395
Brunswick, Georgia 31521

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-8694

KEVIN WAYNE SULLIVAN,
Plaintiff-Appellant,

v.

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Defendants-Appellees.

Feb. 13, 1984.

Appeal from the United States District Court for the Southern District of Georgia

---

Before HILL and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

[1] In this appeal, Kevin Wayne Sullivan challenges the dismissal of his complaint in an action under the Jones Act, 46 U.S.C. § 688, and the general maritime law, arising from an incident aboard a boat owned and

operated by the State of Georgia. The sole question presented is whether the Eleventh Amendment precludes Sullivan from pursuing such a suit against a state department and one of its vessels in federal court. Specifically, the issue is whether the State of Georgia constructively waived immunity under the Eleventh Amendment by operating a research vessel in the navigable waters of the United States. Concluding that it did not, we affirm the judgment of the district court.

I. BACKGROUND

The Research Vessel "Anna" (R/V "Anna") is owned and operated by the Georgia Department of Natural Resources (DNR). Rigged much like an ordinary shrimp boat, the R/V "Anna" monitors the coastal waters of Georgia, and at times Florida, in connection with state fish and shrimp assessment programs. Prior to February 25, 1982, Kevin Wayne Sullivan was employed as a second mate on the R/V "Anna." On that date, he was severely injured when a loose boom struck his head.

Asserting that he was a "seaman" under the terms of the Jones Act, 46 U.S.C. § 688, Sullivan filed suit against the DNR and the R/V "Anna", seeking damages for injuries resulting from the negligence of the defendants and the unseaworthiness of the vessel. In its order of October 29, 1982, the district court granted the defendants' motions to dismiss on Eleventh Amendment grounds.

II. PRELIMINARY ISSUES

[2] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

Although the amendment does not, by its terms, bar federal court suits brought against a state by its own citizens, it is well established that an unconsenting state is immune from such suits as well as those brought by citizens of another state. See *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-1356, 39 L.Ed.2d 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *Cate v. Oldham*, 707 F.2d 1176, 1180 (11th Cir. 1983).

[3] A threshold issue in an Eleventh Amendment case is whether the suit against the defendant is properly characterized as a suit against the state. That the instant action against the DNR and the R/V "Anna" should be so characterized is not seriously disputed.

To the extent that actions under the Jones Act, 46 U.S. § 688, and actions under the general maritime law are barred by the Eleventh Amendment unless the state has waived its immunity, see *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); *In re New York* (Walsh), 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921); *In re New York* (*The Queen City*), 256 U.S. 503, 41 S.Ct. 588, 65 L.Ed. 1057 (1921), the central question is whether the State of Georgia waived, expressly or impliedly, immunity under the Eleventh Amendment. Sullivan does not contend that there was an express waiver of immunity on the state's part, so we need only consider whether there was an implied, or constructive, waiver in this case.

III. CONSTRUCTIVE WAIVER

The leading Supreme Court cases in this field are *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), and *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). In *Parden*, the Court held that the State of

Alabama had waived its Eleventh Amendment immunity from liability under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which provides that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," 45 U.S.C. § 51, and that actions under the Act "may be brought in a district court of the United States," 45 U.S.C. § 56. The Court initially addressed two questions: whether Congress in enacting the FELA intended to subject a state to suit under the Act and whether Congress had the power to do so over the state's claim of immunity. Emphasizing the "all-embracing language" of the statute, the Court concluded that the FELA did authorize suit against a publicly owned railroad despite a claim of sovereign immunity. 377 U.S. at 188-89, 84 S.Ct. at 1210-1211. Noting that "the State surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," the Court also concluded that imposition of the FELA right of action upon a state-owned railroad is within the congressional regulatory power. *Id.* at 191-92, 84 S.Ct. at 1212-1213. The Court then held that by operating a railroad for profit in interstate commerce, the state had knowingly entered a federally regulated sphere and had thereby consented to suit in federal court. The Court stated:

Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate com-

merce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Id.

On the basis of *Parden*, several lower courts ruled that states venturing into the federally regulated sphere of maritime commerce waived their immunity under the Eleventh Amendment from suits brought by employees on state-owned vessels. *See Rivet v. East Point Marine Corp.*, 325 F.Supp. 1265, 1267 (S.D. Ala. 1971), *overruled, Benniefield v. Valley Barge Lines*, 472 F.Supp. 314, 317 (S.D. Ala. 1979); *Adams v. Harris County, Texas*, 316 F.Supp. 938, 949 (S.D. Tex. 1970), *rev'd on other grounds*, 452 F.2d 994 (5th Cir. 1971), *cert. denied*, 406 U.S. 968, 92 S.Ct. 2414, 32 L.Ed.2d 667 (1972); *Huckins v. Board of Regents of the University of Michigan*, 263 F.Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska*, 246 F.Supp. 328, 330 (D. Alaska 1965).

The Supreme Court then decided the *Employees* case, in which it rejected the claims of state employees under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. While conceding that Congress intended to bring the employees in question within the coverage of the statute, the Court indicated that the issue was whether Congress intended to abrogate the states' Eleventh Amendment immunity from suit in *federal court*. The Court first distinguished *Parden* as involving a business which the state operated "for profit," stressing that the state institutions in *Employees* were "not operated for profit [and thus were] not proprietary." 411 U.S. at 284, 93 S.Ct. at 1617. The Court then stated:

> When employees in State institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on

> the States. Congress, acting responsibly, would not be presumed to take such actions silently.

Id. at 284-85, 93 S.Ct. at 1618. Finding that Congress had not indicated "in some way by clear language that the constitutional immunity was swept away," *id.*, the Court declined to "conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum," *id.*

The law of this circuit was plainly stated in *Intracoastal Transportation, Inc. v. Decatur County, Georgia*, 482 F.2d 361 (5th Cir. 1973), in which the former Fifth Circuit assessed the effect of the *Employees* decision on the holding in *Parden*.[1] The court declared:

> [T]he *Employees* decision added an additional requirement to the *Parden* test for determining whether a private party may successfully invoke a federal court's jurisdiction in his suit against a State. It is no longer sufficient merely to show that a State has entered a federally regulated sphere of activity and that a private cause of action is created for violating the applicable federal provision, but *in addition the private litigant must show that Congress expressly provided that the private remedy is applicable to the States.*

Id. at 365 (emphasis added) (footnote omitted); *see also Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1158 (5th Cir. 1981) (reaffirming adherence to the "clear statement" approach to immunity taken in *Intracoastal*).

In response to the Supreme Court's decision in *Employees* and the Fifth Circuit's interpretation of that decision, one of the lower courts which had initially extended *Parden* to suits arising from state maritime ac-

---

[1] The Eleventh Circuit in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

tivity reversed its stance. In *Benniefield*, the Southern District of Alabama held that waiver of immunity under the Eleventh Amendment could not be implied in an admiralty action against a state without a clear statement from Congress that the cause of action encompassed a private remedy applicable to the state. *See* 472 F.Supp. at 317. Similarly relying on *Intracoastal*, the Southern District of Texas recently held that no implied waiver of immunity from Jones Act liability could be found where the state operated a ferry service in navigable waters. *See Welch v. State Department of Highways and Transportation*, 533 F.Supp 403, 406 (S.D. Tex. 1982). In applying the "clear Statement" approach, the court stated:

> The wording of the Jones Act itslf does not include an express decision by Congress to abrogate the eleventh amendment immunity of the states and Plaintiff has not demonstrated through the legislative history of this statute that Congress had a specific intent to allow private parties to bring suit against a state.

Id.

[4] The result dictated by *Intracoastal* is evident. Assuming that the State of Georgia entered a federally regulated sphere of activity by operating a research vessel and that a private cause of action is created for violating the Jones Act, neither the statute nor its legislative history constitutes an express congressional provisions that the private remedy is applicable to the states. More precisely, Sullivan has failed to demonstrate Congress' express intention to abrogate immunity from suit in federal court. Accordingly, we hold that the DNR's operation of the R/V "Anna" did not constitute a constructive waiver of Eleventh Amendment immunity from suits under the Jones Act and the general maritime law.[2]

---

[2] Although a panel of this court, as opposed to the court en banc, is bound by former Fifth Circuit precedent, careful reading of the

Sullivan cites two cases from district courts in other circuits as establishing that states engaging in maritime activities impliedly waived their Eleventh Amendment immunity from liability under the Jones Act. In *In re Holoholo*, 512 F.Supp. 889 (D. Haw. 1981), the court ruled that "the intent to abrogate [immunity] manifested in the Jones Act . . . established constructive waivers" in a case involving Hawaii's operation of a research vessel for profit. *Id.* at 903. In *Brody v. North Carolina*, 557 F.Supp. 184 (E.D.N.C. 1983), the court observed, "by enacting the Jones Act, Congress demonstrated its intention to abrogate the State's eleventh amendment immunity." *Id.* at 186. In finding an implied waiver of immunity in a case involving a state-owned ferry, the court underscored "the fact . . . that the operation of a ferry system is essentially a commercial and proprietary enterprise." *Id.* at 187. We find these cases unpersuasive. First, in neither case did the court attempt to apply the "clear statement" approach adopted in *Intracoastal*. Second, unlike in the instant case, the businesses in question were conducted by the states for profit. Although the proprietary nature of a publicly owned enterprise is not necessarily dispositive of the waiver issue, it was central to the *Employees* Court's analysis, specifically its decision to require "clear language that the constitutional immunity was swept away." 411 U.S. at 285, 93 S.Ct. at 1618.

---

cases suggests to us that *Intracoastal* may sweep too broadly in its interpretation of *Employees*. First, the *Intracoastal* court formulated *Employees'* requirement of a clear statement of congressional intent to abrogate federal court immunity as a requirement of a clear statement of congressional intent to provide a private remedy against the states. Thus the question whether Congress intended a remedy in federal court was broadened to the question whether Congress provided any private remedy at all. In *Employees*, the Court found that there was a private remedy, but that Congress said nothing indicating that federal courts were competent to render judgment against nonconsenting states. Here there is arguably a private remedy against the states, see *Petty v. Tennessee-*

For these reasons, the judgment of the district court dismissing the complaint is AFFIRMED.

Missouri Bridge Commission, 359 U.S. 275, 281, 79 S.Ct. 785, 789-790, 3 L.Ed.2d 804 (1959); the issue should be whether Congress explicitly authorized suit in federal court notwithstanding immunity under the Eleventh Amendment.

More important, the Court in *Intracoastal* apparently ignored the Supreme Court's inquiry into the availability of alternative remedies. In *Employees*, the Secretary of Labor had authority to bring suit under the FLSA. In this case, as in *Parden*, there is no corresponding public enforcement mechanism.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8694

D.C. Docket No. CV282-84

KEVIN WAYNE SULLIVAN,
Plaintiff-Appellant,

versus

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

---

Before HILL and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 13, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ Miguel J. Cortez, Jr.
Deputy Clerk

ISSUED AS MANDATE: MAR 21 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8694

KEVIN WAYNE SULLIVAN,
Plaintiff-Appellant,

versus

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 11 Cir., 1984, —— F.2d ——).
(March 13, 1984)

Before HILL and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majortiy of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CV282-84

KEVIN WAYNE SULLIVAN,
Plaintiff,

vs.

THE GEORGIA DEPARTMENT OF NATURAL RESOURCES AND THE RESEARCH VESSEL "ANNA",
Defendant.

ORDER

This maritime case is presently before the Court on defendants' motion to dismiss plaintiff's complaint on the following grounds: (1) the complaint fails to state a claim upon which relief may be granted; (2) since this is an action against the State of Georgia, which has neither consented to be sued nor waived its sovereign immunity from suit, the Court lacks jurisdiction over the subject matter of plaintiff's complaint and over the persons of the defendants, the Georgia Department of Natural Resources and the Research Vessel "ANNA" (owned and operated by the Department of Natural Resources); (3) insofar as plaintiff seeks to bring an action under the provisions of general maritime law, such action is barred by the Eleventh Amendment to the United States Constitution; (4) insofar as plaintiff's complaint seeks to bring an action under the Jones Act, such action is barred by the Eleventh Amendment to the United

States Constitution; and, (5) venue is improper in this Court.

Because the Court concludes in the following discussion that defendants' jurisdictional grounds for dismissal based on Eleventh-Amendment immunity (grounds 2, 3 and 4 above) have merit, the Court finds it unnecessary to address the alternative grounds stated in grounds 1 and 5 above. For the reasons indicated below, the defendants' motion to dismiss the plaintiff's complaint is GRANTED. All claims of plaintiff against the Georgia Department of Natural Resources and the Research Vessel "ANNA" are DISMISSED with prejudice.

Plaintiff brought this action in admiralty under provisions of the Jones Act, 46 U.S.C. § 688, and the general maritime law. He alleges in his complaint that he was employed as a second mate aboard the Research Vessel "ANNA" (R/V "ANNA"), which is owned and operated by the Georgia Department of Natural Resources (DNR). Plaintiff further alleges that, while so employed on or about February 25, 1982, he was injured due to the negligence of the defendants and the unseaworthiness of the vessel.

Defendants contend that a suit against the DNR or the R/V "ANNA" is, in essence, a suit against the State of Georgia and that a suit is barred by the Eleventh Amendment of the United States Constitution. Although plaintiff does not deny that this action is, in essence, a suit against the State of Georgia, he argues that the operation of a vessel in navigable waters constitutes an implied waiver of Eleventh-Amendment immunity and subjects the state to jurisdiction under the Jones Act. Defendants deny that Georgia has expressly or impliedly waived its immunity from suit under the Jones Act or general maritime law.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the amendment's terms do not specifically bar suits brought against a state by the state's *own* citizens, the immunity has been extended to such suits as well as those brought by citizens of another state. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 88 L.Ed. 1121 (1944); *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842 (1890). The immunity has been further extended to include state agencies and officials "when the action is in essence one for the recovery of money from the state. . . ." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 89 L.Ed. 389 (1945). A state may, however, waive its immunity, *Missouri v. Fiske*, 290 U.S. 18, 78 L.Ed. 145 (1933), but the conclusion that there has been a waiver of immunity will not be lightly inferred. *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L.Ed.2d 662 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 53 L.Ed. 742 (1909).

It is clear that actions under general maritime law brought against a state are barred by the provisions of the Eleventh Amendment, unless the state has waived its immunity. *Ex parte State of New York*, 256 U.S. 503, 65 L.Ed. 1063 (1921). Similarly, the Eleventh Amendment grants immunity to the states against actions brought under the Jones Act, unless the state has waived its immunity. *See Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L.Ed.2d 804 (1959) (finding a waiver but recognizing that, without the waiver, immunity would bar the Jones Act claim). Thus, the crucial issue here is whether the State of Georgia waived its Eleventh-Amendment immunity in the circumstances of this case.

Plaintiff's opposition to the motion to dismiss is based on the argument that the State of Georgia impliedly waived its Eleventh-Amendment immunity when the state chose to operate a "vessel" within the meaning of the Jones Act. This argument relies heavily on the Supreme Court decision of *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 12 L.Ed. 233 (1964).

In *Parden*, the Supreme Court held that Alabama had waived its Eleventh-Amendment immunity with regard to liability under the Federal Employers' Liability Act, which provides that "every common carrier by railroad while engaging in commerce between any of the several States" shall be liable in federal court to employees injured on the job. 45 U.S.C. §§ 51, 56. The Supreme Court reasoned that, by operating a railroad "for profit" in interstate commerce, Alabama had knowingly entered a federally regulated sphere and had thereby consented to suit in federal court. According to the *Parden* Court, "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." 377 U.S. at 191, 12 L.Ed.2d at 239.

On the basis of *Parden*, several lower courts have ruled that states venturing into the federally regulated sphere of maritime commerce waive their Eleventh-Amendment immunity with regard to claims made by employees on state-owned vessels. *Rivet v. East Point Marine Corp.*, 325 F.Supp. 1265, 1267 (S.D. Ala. 1971), *ovr'd, Bennie-field v. Valley Barge Lines*, 472 F.Supp. 314, 317 (S.D. Ala. 1979); *Adams v. Harris County, Texas*, 316 F. Supp. 938 (S.D. Tex. 1970), *rev'd on other grounds*, 452 F.2d 994, *cert. denied*, 406 U.S. 968 (1972); *Huckins v. Board of Regents of the University of Michigan*, 263 F.Supp. 622, 623 (E.D. Mich. 1967); *Cocherl v. Alaska*, 246 F.Supp. 328, 330 (D. Alaska 1965). After these trial court applications of *Parden*, however, the Supreme Court decided *Employees of the Department of Public*

Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 36 L.Ed.2d 251 (1973), a case that had significant impact on *Parden*. In *Employees*, the Supreme Court stated, "[W]e decline to extend Parden to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." *Id.* at 286-287, 36 L.Ed.2d at 257-258.

In interpreting the effect of the *Employees* decision on the holding in *Parden*, the Fifth Circuit has stated:

> [T]he *Employees* decision added an additional requirement to the *Parden* test for determining whether a private party may successfully invoke a federal court's jurisdiction in suit against a State. It is no longer sufficient merely to show that a State has entered a federally regulated sphere of activity and that a private cause of action is created for violating the applicable federal provisions, but *in addition the private litigant must show that Congress expressly provided that the private remedy is applicable to the States.*

Intracoastal Transportation, Inc. v. Decatur County, Georgia, 482 F.2d 361 (5th Cir. 1973) (emphasis added). In *Freimanis v. Sea-Land Service, Inc.*, 654 F.2d 1155, 1158 (5th Cir. 1981), the Fifth Circuit reaffirmed its adherence to the "clear statement" approach to Eleventh-Amendment immunity taken in *Intracoastal*.

In response to the Supreme Court's decison in *Employees* and the Fifth Circuit's interpretation of the impact of that decision on *Parden*, one of the lower courts that had originally extended *Parden* to state involvement in maritime activity decided to reverse its earlier stance. In *Benniefield v. Valley Barge Lines, supra*, the court held that no implied waiver of Eleventh-Amendment immunity could be found in admiralty without a

clear statement from Congress that the maritime causes of action afford a private remedy which is applicable against the states. *Id.* at 317. In so holding, that court overruled its decision in *Rivet v. East Point Marine Corp.*, *supra*, which had found an implied waiver of state immunity to Jones Act liability.

Also relying on the Fifth Circuit's interpretation of *Employees* and *Parden*, the Southern District of Texas has recently held that no implied waiver of immunity to Jones Act liability could be found where the state operated a ferry service in commerce over navigable waters. *Welch v. State Department of Highways and Transportation*, 533 F.Supp. 403, 406 (S.D. Tex. 1982). After noting that the Fifth Circuit rule requires a clear statement by Congress that the Jones Act gives a private right of action against the states, the district court in *Welch* stated:

> The wording of the Jones Act itself does not include an express decision by Congress to abrogate the eleventh amendment immunity of the states and Plaintiff has not demonstrated through the legislative history of this statute that Congress had a specific intent to allow private parties to bring suit against a state.

Id. at 406. This Court finds the rationale of *Welch* persuasive [1] and notes that the facts of the present case are even more clearly in the state's favor than were the facts in *Welch*. There, the state-owned vessel was op-

---

[1] Only one lower court case decided after *Employees* has found that states engaging in maritime activities impliedly waived their Eleventh-Amendment immunity to Jones Act liability. *In re Holoholo*, 512 F.Supp. 889 (D. Hawaii 1981). In that case, the court, after concluding that *Parden* was "directly applicable to the Jones Act," virtually ignored the Supreme Court's decision in *Employees*. Because such an approach is clearly contrary to the Fifth Circuit's interpretation of the relationship between *Parden* and *Employees*, this Court finds *In re Holoholo* unpersuasive.

erated as a ferry in interstate commerce. *Id.* at 405. This involvement in commerce made reliance on *Parden* tenable, since *Parden* itself rested on the determination that Alabama waived its immunity to suit by entering interstate commerce in a profit-seeking, railroad enterprise. *Parden* is less clearly applicable to the present facts since the R/V "ANNA" has not been alleged to have engaged in interstate commerce.[2] Rather, the R/V "ANNA" is engaged in research to study and conserve the natural resources of Georgia. Although, as the plaintiff correctly suggests, the Jones Act itself does not require that the vessel in question be engaged in interstate commerce, lack of entry into interstate commerce nevertheless makes finding an implied waiver of immunity to the Jones Act much more difficult under the *Parden* analysis.

Even if this Court were willing to find that Georgia's operation of a research vessel constituted entry into a federally regulated sphere under the rationale of *Parden*, the Court would still have to meet the added requirement of *Employees* as it has been interpreted by the Fifth Circuit—the private litigant must demonstrate that Congress clearly provided for a private Jones Act remedy against the states. Like the court in *Welch*, *supra*, this Court concludes that there is nothing in the Jones Act resembling a "clear statement" of intent to allow private parties to bring suit against a state. Absent such a clear statement and in view of the Fifth Circuit's justifiably rigorous approach to implied waiver, the Court holds that Georgia's operation of the R/V "ANNA" did not constitute an implied waiver of Eleventh-Amendment immunity from suit under the Jones Act or general maritime law. Accordingly, defendants' motion to dismiss

---

[2] In another context, federal law has specified that oceanic research vessels shall not be deemed to be engaged in trade or commerce. 46 U.S.C. § 443.

plaintiff's complaint is hereby GRANTED. The Clerk of Court is directed to enter an appropriate judgment.

SO ORDERED, this 29 day of October, 1982.

/s/ Anthony A. Alaimo
Chief Judge
United States District Court
Southern District of Georgia